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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1409

LONNIE NORTH ..... APPELLANT

VS:

C. B. RUSSELL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY ..... APPELLEES

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of Kentucky, rendered on March 21, 1975. The judgment re-affirms on remand from this Court a decision by the Harlan Circuit Court denying apellant's petition for writ of *habeas corpus*. Appellant submits this Statement to show that the Supreme Court of the United States has *jurisdiction* of the appeal and that a ***substantial federal question*** is presented.

(a) OPINION BELOW

The opinion of the Court of Appeals of Kentucky is

of this date, unreported. A copy of the opinion appears in the Appendix hereto.[1]

(b) JURISDICTION

(1) Nature of the Proceedings

This suit was filed by Appellant, North, in Harlan County, Kentucky Circuit Court seeking, by writ of *habeas corpus*, to secure his release from confinement in the Harlan County Jail under a sentence of 30 days imprisonment imposed by appellee, Russell, Lynch City Police Judge. North was convicted in the Lynch City Police Court of the crime of driving while intoxicated, fined $150.00, and imprisoned for a term of 30 days in the Harlan County Jail. North's driving privileges were also revoked. In the trial court, North maintained that his rights to due process and equal protection of the laws accorded to him as a citizen of the United States of America by the Fourteenth Amendment of the United States Constitution were abridged,[2] in that he was accused, "tried", and convicted in a court presided over by a Judge, destitute of legal competency and capacity, who derived his authority under certain Kentucky Statutes.

(1) Trial Court Proceedings

After issuing its writ of *habeas corpus* and enlarging the appellant on bail, the Harlan Circuit Court held a full

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1. Appendix 1, Page 1a-5a.

2. The petition for writ of habeas corpus, raising the issues presented in this statement in the Harlan Circuit Court, is printed in Appendix 2, Page 6a-11a of this Statement.

evidentiary hearing on July 23, 1974, Appendix 5, Page 19a. Following the hearing, it reluctantly dissolved the writ of *habeas corpus* under the precedent of *Ditty* v. *Hampton*, 490 S.W.2d 772 (Ky. 1972),[3] *dismissed as moot*, 414 U.S. 885 (1973), and ordered North remanded to the custody of the Harlan County Jailer, permitting him to continue on bail provided he file a notice of appeal to the Court of Appeals of Kentucky.[4] On July 23, 1974 appellant filed his designation of the entire record, together with his notice of appeal to the Court of Appeals of Kentucky. On August 5, 1974, he filed his motion for appeal and other necessary papers.

(2) Initial State Appellate Court Proceedings

On August 12, 1974, the Court of Appeals of Kentucky, the Court of last resort in Kentucky, affirmed *per curiam* the judgment of the Harlan Circuit Court, granting the motion for appeal, but denying the writ of *habeas corpus* and setting aside North's bail, *North* v. *Russell*, 516 S.W. 2d 103 (Ky. 1974).

On August 26, 1974, North filed with the Court of Appeals of Kentucky his notice of appeal that the decision

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3. The trial court dissolved the writ with reluctance and only after slapping the system that "allows persons of insufficient training, knowledge and experience to preside at criminal trials which, inherently, require a great deal of training, knowledge and experience in order that each citizen be accorded the rights guaranteed to him by the law".

4. The opinion of the trial court is printed in Appendix 3, Page 12a-16a.

of the Court of Appeals of Kentucky was appealed to the Supreme Court of the United States of America pursuant to *28 U.S.C. Section 1257* (2) (1970).

(3) Previous United States Supreme Court Proceedings

That first appeal to this Court was docketed October 16, 1974 as number 74-437. On that appeal this Court vacated the judgment of the Kentucky Court of Appeals and remanded the case, *North* v. *Russell*, 516 SW 2d 103 (Ky. 1974), *Judgment vacated*, 95 S.Ct. 673 (1974), to the Court of Appeals of Kentucky "for further consideration in light of the position presently asserted by the Commonwealth". The remand had been urged by the Attorney General of Kentucky upon his suggestion that North should be released "solely upon the basis of violations of Kentucky Law. . . ."

(ii) Judgment on Remand and Notice of Appeal

On March 21, 1975, the Court of Appeals of Kentucky, *while recognizing the absurdity of the lay judge system*, again affirmed the judgment of the trial court, noting that the Federal Constitutional questions urged throughout this case were the only questions presented on this appeal and that there were no State questions presented (as argued by the Attorney General in his motion to dismiss or affirm) upon which North might be freed. See Appendix 1, Page 1a.

The Court of Appeals again refused to order North's release. On March 26, 1975, North again filed a Notice of Appeal that this most recent decision of the Court of Appeals was appealed to the United States Supreme Court pursuant to 28 U.S.C. Section 1257 (2) (1970).[5]

(iii) Statutes Conferring Jurisdiction

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Section 1257 (2) (1970). Certiorari jurisdiction is conferred by 28 U.S.C. 1257 (3) (1970).

(iv) Cases Sustaining Jurisdiction

It is contended that the following cases sustain the jurisdiction of this Court: *Cox* v. *State of Louisiana*, 379 U.S. 536 (1965); *Mills* v. *State of Alabama*, 384 U.S. 214 (1966); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938).

(v) Statutes Involved

The validity of Kentucky Revised Statutes Sections 26.010, 26.140, 26.150 (1), 26.200 and Kentucky Constitution, Section 130 are involved in this appeal.

Kentucky Revised Statute Section 26.010 provides:

> "Except as provided in K.R.S. 167.990, 208.020, subsection (4) of 208.990 and 242.990, police courts in *cities of every class* have jurisdiction exclusive of circuit courts in all penal and misdemeanor cases where the punishment is limited to a fine of not more than twenty dollars, jurisdiction concurrent with circuit courts of all penal and misdemeanor cases where the punishment is limited to a fine of not more than

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5. Appendix 4, Page 17a-18a.

five hundred dollars, or imprisonment not exceeding twelve months, or both, and exclusive jurisdiction of all violations of city ordinances occurring within the city limits". (Emphasis added).

Kentucky Revised Statute Section 26.140 provides:

"The judge of the police court in cities of the *first class* shall have the qualifications and take the oath required of circuit judges. The judge shall devote his whole attention to the duties of his court. He shall have each year a vacation of two months. Subject to K.R.S. 26.300, the judge may adopt rules and regulations for conducting the business of his court, and may enforce them by process of contempt. He shall have all powers necessary to try cases coming under his jurisdiction. He may administer oaths, and shall be a conservator of the peace. His salary shall be fixed by ordinance, and paid at the same time and in the same manner as the salaries of other city officers". (Emphasis added).

Kentucky Constitution Section 130 provides:

"No person shall be eligible as judge of the circuit court who is less than thirty-five years of age when elected, who is not a citizen of Kentucky, and a resident of the district in which he may be a candidate two years next preceding his election, and who has not been a practicing attorney eight years."

Kentucky Revised Statutes Section 26.150 (1) provides:

"In cities of the *second class* the police court shall have

one judge. He shall receive an annual salary of not more than $12,600 to be fixed by ordinance, and no other compensation except the fees allowed to judges for holding examining trials in felony cases. He shall have each year a vacation of one month. No person shall be eligible to be police judge unless at the time of his election he is at least twenty-five years of age and has been a resident of the city for at least four years, and is an attorney-at-law". (Emphasis added.)

Kentucky Revised Statutes Section 26.200 provides:

"No person shall be eligible to be police judge in a city of the *fifth* or *sixth class* unless he is a resident and voter of the city, and has resided there for a year next preceding his election or appointment. Before entering upon the duties of his office, the judge shall execute a bond to the Commonwealth with good and sufficient sureties, approved by the county judge. The bond shall be filed and recorded in the county clerk's office and an entry made upon the order book of the county court, showing that the bond was executed and approved and giving the names of the sureties. The county judge, at any time that he has reason to believe that the bond is not good or that the sureties are about to become insolvent, shall require that a new bond be executed or additional sureties given on the old one." (Emphasis added).

The Statute under which the appellant is imprisoned is KRS 189.520 (2).

KRS 189.520 (2) provides:

"No person shall operate a motor vehicle anywhere in this state while under the influence of intoxicating beverages or any drug which may impair one's driving ability."

KRS 189.990 (10(a) (1972), provides:

"Any person who violates subsection (2) of KRS 189.520 shall be fined, for the first offense, not less than $100.00 nor more than $500.00, and for each subsequent offense he shall be fined not less than $100.00 nor more than $500.00 and imprisoned for not more than six months."

(c) STATEMENT OF QUESTIONS PRESENTED

(1) Are Kentucky Revised Statutes, Sections 26.010, 26.140, 26.150 (1), and 26.200 invalid under the Equal Protection clause of the Fourteenth Amendment of the United States Constitution insofar as those statutes subject the appellant (a criminal defendant convicted and sentenced to a term of confinement in a city court in a fifth class city) to spurious trial, conviction, and imprisonment before a judge: (a) who was untrained in the law and unfamiliar with the substantive and procedural rights guaranteed to the appellant by the Constitution of the United States and the laws and Constitution of the Commonwealth of Kentucky; (b) who because of such lack of training and unfamiliarity, lacked the competency and capacity to afford appellant a fair and impartial trial; (c) who actually failed to provide appellant with a fair and impartial trial; whereas a criminal defendant accused of identical crimes in courts of identical name, territorial, and criminal jurisdiction in a first and second class city (designated as such

solely on the basis of population) is accorded a judge trained and licensed as an attorney?

(2) Is Kentucky Revised Statute, Section 26.200, fixing the qualifications of police judges in fifth and sixth class cities invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States of America, insofar as that statute subjects the appellant (a criminal defendant accused, convicted and sentenced to a term of imprisonment in a city court in a Kentucky Fifth Class City) to spurious trial, conviction and imprisonment before a judge: (a) who was untrained in the law and unfamiliar with the substantive and procedural rights guaranteed to the appellant by the Constitution of the United States of America and the laws and Constitution of the Commonwealth of Kentucky; (b) who, because of such lack of training and unfamiliarity, lacked the capacity to afford the appellant a fair and impartial trial; and (c) who actually failed to provide appellant with a fair and impartial trial?

(3) Does the due process clause of the Fourteenth Amendment to the United States Constitution prohibit the spurious trial, conviction and imprisonment of the appellant, a defendant accused of misdemeanor conduct in a Kentucky Police Court, before a tribunal presided over by a judge who: (a) was not cognizant or familiar with the substantive and procedural rights guaranteed to the appellant by the Constitution of the United States and the laws and Constitution of the Commonwealth of Kentucky; who, because of such lack of training and familiarity, lacked the ability, capacity and competency to afford appellant a fair and impartial trial, and; actually failed to

provide appellant with a fair and impartial trial; and, (b) was fully reliant on the city prosecutor for legal information and interpretation?

(d) STATEMENT OF THE CASE

On July 10, 1974, the appellant, Lonnie North, was arrested in Lynch, Kentucky, and charged with the crime of driving while intoxicated denounced by KRS 189.520 (2), penalty, 189.990 (10) (a).[6] He was directed to appear for trial on July 18, 1974, at 7:00 P.M. before the Lynch City Police Court. This court is located in a Kentucky city of the fifth class[7] and is presided over by the appellee, C. B. Russell.

At the appointed time and place, North appeared for trial, and, upon entering a plea of "not guilty," demanded a trial by jury. The occurrences at the appellant's "trial" are substantially agreed upon by all the persons who testified in this action before the Harlan Circuit Court as follows:

(1) North entered a plea of "not guilty."

(2) North, indeed, demanded a jury trial, to which he was entitled (Ky. Const. 11, KRS § 25.014).

(3) The appellee, C. B. Russell, called the city prosecuting attorney for advice as to whether or not he was required to grant appellant a jury trial.

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6. Appendix 7, Page 39a.

7. Kentucky Revised Statutes § 81.010.

(4) The appellee, C. B. Russell, advised the appellant that he was not required to grant to him a jury trial and that he intended to proceed to try him himself.

(5) Appellee, C. B. Russell, after hearing only the arresting officer, adjudged the appellant guilty of the crime of driving while intoxicated and imposed a fine of $150.00, sentenced him to 30 days in the county jail,[8] and revoked his driver's license.

(6) At the said "hearing," the appellant was not afforded a trial by jury; was not advised of his right to trial by jury; was not advised of his right to confront all witnesses against him and to cross-examine such witnesses; was not advised of his right to legal counsel; was tried and convicted without having the aid and assistance of legal counsel; and was not advised of his right against self-incrimination.

(7) The City Police Court of the City of Lynch, Lynch, Kentucky, is presided over by a lay judge who, admittedly, is not cognizant of the various constitutional, statutory, and common-law substantive and procedural rights guaranteed to the appellant as a citizen of Kentucky and as a citizen of the United States of America, and does not possess the necessary knowledge, understanding, training, or experience to

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8. Even the imprisonment imposed at this spurious "trial" was unauthorized since the penalty for the first offense is limited to a fine only and since the charge did not specify multiple offenses. KRS § 189.990(10)(a), Appendix 7.

enable him to accord to the appellant such various constitutional, statutory, and common-law substantive and procedural rights.

(8) The appellee, Russell, was fully dependent upon the city prosecuting attorney for decisions upon legal questions emerging during criminal trials.[9]

After having spent the better part of a full day in jail under the conviction, North, on July 19, 1974, filed in the Harlan Circuit Court a petition for writ of *habeas corpus,* seeking his release. The allegations in that petition are set forth in *Appendix* 2. A writ of *habeas corpus* issued on July 19, 1974, and was directed to appellee, C. B. Russell, the City Judge, and Nathaniel "Trap" Helton, the jailer to whose custody North was committed. On the same day, North was ordered released on bail. Following the hearing held at Harlan, Kentucky on July 23, 1974, the Harlan Circuit Court, after reciting the various constitutional challenges of appellant, dissolved the writ of *habeas corpus,* see *Appendix* 3. While expressing doubt about the soundness of the decision of the Court of Appeals of Kentucky in *Ditty* v. *Hampton,* supra, the court felt bound by that decision and ordered North remanded to custody. enlarging him on bail in the event that he should file a prompt notice of appeal to the Court of Appeals of Kentucky. On the same day, July 23, 1974, he filed his Notice of Appeal and his designation of the entire record.

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9. For confirmation of some of these occurrences we have reprinted Judge Russell's entire testimony in Appendix 5, Page 19a-37a.

On August 5, 1974, North filed in the Court of Appeals of Kentucky his Motion for Appeal, together with the appropriate record and other necessary documents.

In the Court of Appeals of Kentucky, the constitutional arguments set forth in the petition for writ of habeas corpus and presented in this appeal were duly argued and presumably considered by the Court of Appeals since, on August 12, 1974, the Court of Appeals of Kentucky granted the motion for appeal and affirmed the decision of the Harlan Circuit Court in its entirety, citing *Ditty* v. *Hampton, supra,* although it did set aside appellant's bail, *North* v. *Russell,* 516 SW 2d 103 (Ky. 1974). Appellant was freed on a stay order by Honorable Justice Potter Stewart entered September 10, 1974.

The decision of the Court of Appeals was appealed to the Supreme Court of the United States and was docketed in this Court on October 16, 1974 as number 74-437. In his motion to dismiss or affirm, the Attorney General suggested that this Court remand the case to the Kentucky Court of Appeals for "that Court's consideration of whether or not appellant should be granted a writ of *habeas corpus* solely upon the basis of violations of Kentucky law. . . " On December 23, 1974, this Court entered the following remand order:

> "Upon the representation of the Attorney General of Kentucky set forth in his motion to dismiss or affirm filed in this Court on November 29, 1974, the judgment is vacated and the case is remanded to the Court of Appeals of Kentucky for further consideration in light of the position presently asserted by the Commonwealth", 95 S. Ct. 673 (1974).

Upon remand to the Court of Appeals of Kentucky, the remand order was argued by briefs filed by both parties. The Attorney General presented to that Court the same contentions advanced in his motion to dismiss or affirm in this Court, that is, that appellant should be released upon the basis of violations of Kentucky Law. North argued that such release would put him right back in Judge Russell's Court for re-trial. On March 21, 1975, the Court of Appeals of Kentucky, again relying on *Ditty* v. *Hampton*, supra, rendered its final decision, denying North's release to freedom and holding that no state questions were presented in this appeal. That most recent final decision is found in Appendix 1 hereof.

On March 26, 1975, North again filed his Notice of Appeal that the decision of the Court of Appeals of Kentucky was again appealed to the Supreme Court pursuant to 28 U.S.C. Section 1257 (2) (1970).

In the trial court and in the Kentucky Court of Appeals, North attacked his conviction upon serious constitutional grounds:

(1) He challenged the constitutionality of the statutory scheme embodied in Kentucky Revised Statutes, Sections 26.010, 24.140, 24.150 (1), 26.200 and Kentucky Constitution Section 130, as being unconstitutional and repugnant to the equal protection of laws provisions of the Fourteenth Amendment to the United States Constitution, upon the grounds of unequal and discriminatory treatment of him as an accused in a criminal case.

(2) He challenged the constitutionality of KRS § 26.200, establishing the qualifications of police court judges

in cities of the fifth class, as being repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States of America.

(3) He challenged the constitutionality of his conviction, alleging that the trial judge before whom he was tried, lacked the capacity and competency to accord to him the procedural and substantive rights guaranteed to him by the Constitution of the United States of America and the Constitution and laws of the Commonwealth of Kentucky and, because of such incompetency and because of such incapacity, he was, in fact, denied various of his constitutional rights under such laws.

The challenges set forth in paragraphs (1) and (2) above, since they allege the unconstitutionality of various Kentucky statutes upon specific federal constitutional grounds, are maintained in this appeal as a matter of right, pursuant to 28 U.S.C. 1257 (2). The third ground, specially setting forth a right, privilege or immunity under the Constitution of the United States of America, is maintained pursuant to 28 U.S.C. 1257 (3), under which this court is asked to exercise its discretionary writ of *certiorari*.

In order to place the issues raised in this appeal in an appropriate context, it is necessary to outline the place of the police court in the Kentucky court structure. Candidly termed by the Kentucky Court of Appeals "courts of convenience" not equipped or designed "to conduct error-free trials, or to insure full recognition of constitutional freedoms", *Colten* v. *Kentucky*, 467 S.W. 2d 374, 379 (Ky. 1971), *aff'd*, 407 U.S. 104 (1972), police courts, like their companion courts in the Kentucky inferior court system,

find historical roots in eighteenth century practices and needs. Transplanted from England, the institution of the lay judge, aided by a dearth of legally trained persons and the deep-rooted distrust of centralized authority prevalent at the time, acquired considerable political influence in the governing bodies of the newly formed states. See generally R. Ireland, *The County Courts in Antebellum Kentucky* (1972). With the growth of the country, the institution retained its power and diverse array of functions, both political and judicial, by virtue (a) of the continuing domination of state legislatures by rural interests, where lay judges continued to thrive, and (b) its glorified, but often uncritically accepted, heritage. That the institution survives today, however unsuited to the needs of the day, is a monument to the entrenched political nature of the office, a characteristic seemingly at odds with the vestigially retained complex of judicial functions still exercised by lay judges.

This appeal centers on the Kentucky statutory scheme establishing qualifications for police court judges and conferring criminal jurisdiction upon legally uninformed judges. In Kentucky, the police court is one of four inferior court systems. Along with county, quarterly, and justices' courts, the police court has original jurisdiction in all cases where the punishment is limited to a fine of $20.00, Kentucky Revised Statute § 25.010, and concurrent jurisdiction with the circuit court, the higher court in this two-tier system, in all other penal and misdemeanor cases, defined as those crimes punishable by a maximum of one year in jail and a $500.00 fine, Kentucky Revised Statute 26.010. A defendant convicted in police court has an unconditional right to a de novo appeal in the circuit court, where the circuit judge is by law mandated to be a lawyer, Kentucky Constitution 130. For a more complete description of the Kentucky two-tier system, see *Colten* v. *Kentucky*, 407 U.S. 104 (1972).

The *qualifications* of a police court judge are statutorily prescribed. The Kentucky legislative scheme, pertinent parts of which are set out above, after conferring jurisdiction upon Police Courts in all classes of cities (KRS § 26.010) mandates that accused criminal misdemeanants in first and second class cities, of which there are eight in the state, be accorded a judge who is a lawyer, while defendants in lower class cities may be—and almost invariably are—accorded a judge with no legal training and who, indeed, need have no education whatever. The overall scheme is based solely on a formula classifying cities by population, Ky. Const. § 156.[10] Differing age and durational residency requirements are set out for police court judges in different classes of cities, compare Kentucky Revised Statute § 26.170 with Kentucky Revised Statute § 26.200.

The thrust of one of appellant's constitutional arguments is directed at that part of the statutory scheme requiring criminal defendants oftentimes to be tried before untrained lay people in cities with lower populations. The necessarily inferior treatment encountered by criminal defendants, such as the appellant, in these lower class cities goes to the heart of the appellant's due process argument on pp. 34, *infra*. The discriminatory line drawn between

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10. Appendix 8, Page 40a-41a.

police court judges in first and second class cities and all others forms the basis for appellant's equal protection challenge on pp. 31, *infra*.

(e) THE QUESTIONS ARE SUBSTANTIAL

I. THE SUPREME COURT SHOULD REVIEW THIS CASE BECAUSE OF THE BROAD PUBLIC QUESTIONS INVOLVED.

A. The Questions in This Appeal Affect the Administration of Criminal Justice in Many States.

The questions presented in this appeal have a far-reaching significance for the administration of criminal justice in the numerous states that invest lay judges with the power of adjudication and punishment of misdemeanants. Appellant's federal constitutional challenges to the capacity and ability of Judge Russell to conduct an orderly and fair criminal trial in which the punishment imposed was fine, imprisonment, and the collateral consequences of conviction, strike to the heart of the woefully inadequate quality of justice meted out in inferior tribunals presided over by unqualified judges. Although focused on the capacity of one particular lay judge, this case squarely raises basic questions affecting minimum standards of justice and the day-to-day operation of the criminal justice system on the level most closely in touch with the average citizen. This level of courts, appropriately labeled "inferior", has virtually escaped constitutional scrutiny due to a variety of historical and institutional factors.

Among many scholarly observers, former Chief Justice of the California Supreme Court, Roger Traynor, has recognized the importance of the inferior court system:

> "Trial courts of limited jurisdiction, including justice of the peace courts, have unlimited capacity to affect public attitudes toward law for better or worse. It is these courts, not the appellate courts, that the people generally know first hand. What they observe there of justice or injustice, of efficiency or bumbling, determines whether they will look upon the courts with respect and pride or cynicism". Traynor, Rising Standards of Courts and Judges, 40 Calif. S.B.J. 677, 688 (1965).

In *Mayer* v. *Chicago*, 404 U.S. 189 (1971), this Court observed that "'Justice, if it can be measured, must be measured by the experience the average citizen has with the police and lower courts'." *Id. at* 197. As the most independent and unsupervised member of the judicial system, the lay judge occupies a unique and important position at the vanguard of our system of criminal justice. In many states,[11] including Kentucky, the lay judge is entrusted with such various complex and crucial responsibilities as issuing search warrants, conducting preliminary hearings in felony cases, setting bail in felony cases, and, ultimately, presiding over jury and non-jury trials in misdemeanor cases. The arbitrary brand of justice dispensed by most lay judges is legendary and has been roundly criticized over the years by a host of eminent commentators, many of whom have concluded that the performance of lay judges inevitably engenders disrespect for the judicial system. As the cutting edge in a broader movement for judicial

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11. New York University, The Institute of Judicial Administration, The Justice of the Peace Today, 1965, Supplemented 1973.

reform, these commentators have been nearly unanimous in recommending the abolition of lay tribunals, particularly in criminal matters. See *e.g., The President's Commission on Law Enforcement and Administration of Justice, Task Force Reports: The Courts* 36 (1967); Dolan & Fenton. *Justice of the Peace in Nebraska,* 48 Neb. L. Rev. 457 (1969); Vanderbilt, *The Municipal Court in New Jersey,* 10 Rut. L. Rev. 647 (1956); Zimmerman, *Justice of the Peace Courts,* 21 Ore. L. Rev. 380 (1942); Smith, *The Justice of the Peace System,* 15 Cal. L. Rev. 118 (1927).

B. The Questions in This Appeal Affect the Administration of Criminal Justice to Tens of Thousands of Kentucky Citizens.

Current figures are not available relating to case distribution throughout various courts of Kentucky. Research Report No. 39 of the Kentucky Legislative Research Commission, Frankfort, Kentucky, dated September, 1967, entitled, "County Judges and Justices, Some Aspects of Case Loads", shows that in fiscal year 1966-67, fines and forfeitures in these two inferior courts in Kentucky were imposed in 93,338 penal and misdemeanor cases. During that period, fines in 84,838 of the cases were imposed by County Judges (who are not required by law to have legal training), while 8,500 such cases were tried by Justices of the Peace (who are required to have no legal training). Every County Judge in Kentucky's 120 counties had a criminal case load.

Although data is not available in statistical form relating to criminal case loads in city police courts throughout the state, it would seem clear that tens of thousands

of penal and misdemeanor cases are also being handled annually by such courts throughout Kentucky in every class of city. Independent research by University of Kentucky law students for the undersigned (telephone poll of the various 120 counties, September, 1974), shows there are 853 lay judges currently vested with criminal jurisdiction in Kentucky. For a breakdown of lay versus attorney judges in inferior courts in Kentucky, see Appendix 6, Page 30a.

C. This Court Should Resolve the Conflict Between the Decision Rendered by the Supreme Court of the State of California in Gordon v. The Justice Court for the Judicial District of Sutter County and the Decision Rendered by the Court of Appeals of Kentucky in This Case.

The Supreme Court of California in *California* v. *Gordon,* 525 P.2d 72 (Cal. 1974), *cert. denied,* 43 U.S. L.W. 3448 (U.S. Feb. 18, 1975), considered the due process issues raised on this appeal. In that case, the California Court decided unanimously that the current practice of allowing non-attorney judges to preside over criminal trials of offenses punishable by a jail sentence violated the constitutional rights of the defendants in those proceedings as guaranteed to them under the due process clause of the Fourteenth Amendment of the United States Constitution. In so ruling, the California Court mandated that all judges presiding over criminal proceedings involving charges which carry the possibility of a jail sentence must be licensed attorneys, unless the defendant or his counsel waive such requirement. In a comprehensive decision, dealing both with the history of the justice of the peace

court system and with the developing complexities of criminal trials, the Court held: "Since our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process". The California Court, considering a lay judge system which required passage of a written examination before assuming trial of cases (Kentucky has no requirements) found even in the absence of an actual trial or conviction or a showing of actual prejudice, that the system could not withstand a Fourteenth Amendment due process attack.

In its decision, the California Court rejected the holding of the Court of Appeals of Kentucky in *Ditty* v. *Hampton*, supra, stating that the *Ditty* case, and two other state court cases, did not "convincingly [resolve] the inherent inconsistency in guaranteeing a defendant an attorney to represent him without providing an attorney-judge to preside at the hearings. As we have seen, a defendant's right to a fair trial may be substantially abridged by the use of a non-attorney judges". In contrast to the holding of the California Court in *Gordon*, the Kentucky Court of Appeals in *Ditty* decided that "there has never been any thought (by the Supreme Court of the United States) that a right to be tried by a lawyer grows out of the right to be defended by a lawyer", 490 S.W. 2d at 774.

With two conflicting state high court rulings on substantially identical constitutional issues now in effect, it is important that this Court resolve the anomalous situation whereby the citizens of California are living under one interpretation of the due process clause of the Fourteenth Amendment and the citizens of Kentucky under another. Only this Court can resolve this conflict and bring uniformity to the meaning of the Fourteenth Amendment as it relates to legally untrained judges. This reason alone is a compelling reason for this Court to note jurisdiction either upon this appeal or upon *certiorari*.

In this regard, this Court has previously held that the grant of *certiorari* is proper in certain important cases:

(1) Where a federal statute has received conflicting construction by the highest courts of two different states, *United States* v. *Oregon*, 366 U.S. 643 (1961);

(2) Where the case raised important questions, not only to the state involved but to other states having similar laws, *McGhee* v. *International Life Insurance Company*, 355 U.S. 220 (1957);

(3) Where the case draws into question the constitutionality of a statute in force in several other states, *New York* v. *O'Neill*, 359 U.S. 1 (1958).

II. THE ISSUES INVOLVED IN THIS CASE RAISE SUBSTANTIAL FEDERAL QUESTIONS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHICH SHOULD BE REVIEWED.

A. The Kentucky Police Court Scheme is Repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

As the structure of the Kentucky police court system

described above reveals, whether an accused stands trial before a lay judge or an attorney judge depends on his whereabouts. If a person is charged with a misdemeanor in Lexington, Kentucky, a second class city, he is accorded a judge required by statute to be a lawyer. If the same person were charged with the same misdemeanor 18 miles away in Paris, Kentucky, a fourth class city, he might be compelled to stand trial before a lay judge. Yet jurisdiction is conferred upon both courts by the same statute, KRS § 26.010; both courts bear the same name; and both courts have the same territorial and other jurisdiction. The historical antecedents of this scheme, in days when means of transportation and communication were not as sophisticated, perhaps justified a differential treatment. But, in 1974, such a system finds little practical justification. In the *Ditty* case, supra, the legislative justification was said to be:

> " 1. The greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously (not necessarily with more fairness and impartiality).
>
> 2. Lawyers with whom to staff the courts are more available in the larger cities.
>
> 3. The larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts. Cf. Metcalf v. Howard, 304 Ky. 498, 201 S.W.2d 197."

A close analysis of the Kentucky police court scheme reveals an arbitrary and irrational plan which the legislature has fashioned to achieve some vague but unsanctioned

purpose. By requiring lawyer judges in first and second class cities, in obvious recognition of their superior ability to function in a judicial capacity (implicitly recognized by the Court of Appeals in *Ditty*) the legislature has established classifications affecting the fundamental right of criminal defendants to a fair trial without consideration of the most important fact that could conceivably justify such classifications—i.e., the actual number of attorneys in a given area who are qualified to serve as police judges. Consequently, in premising the police court scheme solely on a population basis and without consideration of the actual number of attorneys in a given city or in a given area[12] (e.g. a larger population center with an abundance of attorneys may be close enough to supply outlying areas with the necessary judicial manpower), the Kentucky legislature has established an overinclusive classification burdensome to those criminal defendants who are brought to courts in areas where attorney judges are available to try misdemeanor cases.

In light of the unequal treatment accorded criminal defendants by the Kentucky police court scheme, appellant submits that, under standards applied by this Court to test the compatibility of burdensome legislative classifications with the equal protection clause, this arrangement must be invalidated upon the following considerations:

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12. Harlan County has 22 practicing lawyers, Martindale-Hubbell, Law Directory.

(1) The Kentucky Police Court Scheme Impinges on Appellant's Fundamental Right to a Fair Trial and Cannot be Justified as Necessary to the Achievement of a Compelling State Interest.

In a variety of cases the Court has applied an exacting standard of precision to statutory classifications affecting *fundamental* constitutional rights of individuals. In these cases, the Court has placed a heavy burden on the state to demonstrate that, (a) such laws are "necessary to promote a compelling state interest", *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969), and (b) that the means chosen by the state in pursuing even very substantial interests are the least restrictive methods of achieving the asserted goals of the legislation. *Id. at* 631. See *Dunn* v. *Blumstein*, 405 U.S. 330, 342 (1972). By thus requiring states to carefully tailor discriminatory classifications, the Court has extended the host of constitutional rights to *all* citizens within a state, not merely those favored by imprecisely drawn classifications which are often based on outmoded facts and theories having little, if any, justification in modern times. When measured again the demanding standard of Fourteenth Amendment equal protection, this Kentucky police court scheme cannot stand.

a. The Impingement

As a threshold consideration, it is clear that the statutory scheme permitting uninformed judges to try criminal cases impinges upon a defendant's fundamental right to a fair trial, *California* v. *Gordon*, supra. As discussed more fully below, the lay judge's ignorance of the basic constitutional protections essential to a fair trial—in this regard, it is important to note that most of the

explicit protections of the first ten amendment relate to the trial stage—inherently prejudices and burdens a defendant's right to a fair trial, called in *Estes* v. *Texas*, 381 U.S. 532, 540 (1965), "the most fundamental of all freedoms" and *In re Murchison*, 349 U.S. 133, 136 (1955), "a basic requirement of due process".[13] By definition, a fair trial can only be realized when the rules and limitations governing the trial are recognized and studiously honored. These rules and limitations serve as a necessary precondition to our concept of a fair trial. Without their recognition and knowledgeable interpretation and application by the judge, whose distinct role it is to assure the defendant a fair trial consistent with these established safguards, a fair trial is an impossibility.[14] This case is one monument to that fact.

A criminal trial, even in a misdemeanor case, involves the writing of a charge; fixing of bail; giving notice of the charge; making appropriate provisions for counsel; summoning a jury; empaneling a jury in accordance with technical legal standards; observing very technical and

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13. This Court has recognized that the right to a fair trial is guaranteed in trial courts at all levels and that a "State's trial court procedure [cannot] be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication." Ward v. Village of Monroeville, 409 U.S. 57, 61 (1972).

14. In its most recent decision in this case the Kentucky Court said: "We fully appreciate the absurdity of having a lawsuit—any lawsuit—presided over in this day and age by a person without legal training or experience", Appendix 1, Page 4a-5a.

precise procedural and substantive rules, both codified and uncodified, relating to the order of the hearing, reception of evidence, handling of motions, instructing the jury, and receiving and enforcing a verdict; and the many and varied rules, both procedural and substantive relating to post-trial proceedings and appeals. Rules relating to this criminal process are found in codes of procedure, statutes, state and federal constitutions, and in a great body of common law related by court decisions. Every state has recognized the technical nature of this process and the extensive learning required to master it, and has imposed license standards upon any person who would practice the legal arts.

In this context, Lonnie North found himself charged with a crime and facing loss of his liberty. His trial was programed by the State and Federal Constitutions and by the procedural and substantive rules of law of Kentucky to be both fair and orderly, if, indeed, the program was followed. Unfortunately, there is in Kentucky's criminal processes a kind of legal hypocrisy which emptied the system of all of these protections by introducing into North's trial a judge who knows nothing at all about the procedure rules, much less the various procedural and substantive rights accorded North as a citizen of Kentucky and of the United States. Who can read the transcript in the trial court, (Appendix 5), without concern for the incredible incompentency of Judge Russell whose judicial authority is sanctioned by the very statutes which we now challenge? And who can but feel sympathy and empathetic indigation at the shameful way in which North was accorded the most fundamental of his civil rights—the right to a fair and orderly trial?

b. The Justifications

Once it is concluded that a *fundamental* constitutional guarantee is diluted by the operation of the Kentucky statutory scheme, the state must demonstrate that the classifications are necessary to the ahievement of a compelling state interest, *Shapiro* v. *Thompson,* supra. In light of the three reasons offered by the Kentucky Court of Appeals in *Ditty* v. *Hampton,* supra, as the justification for these provisions, no such showing is made: First, logic and experience may sustain the court's proposition that "the greater volume of court business in the larger cities requires that judges be attorneys to enable the courts to operate efficiently and expeditiously". But, if it is the denial of the right to a fair trial that is in question, this justification is meaningless. It certainly is no reason for depriving one group of citizens of the benefits resulting from such efficiency and expedition. It is well recognized, moreover, that "the Constitution recognizes higher values than speed and efficiency". *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972); second, the assertion that "lawyers with whom to staff the courts are more available in the larger cities", while perhaps compelling eighty years ago, cannot stand as even reasonable in 1974, when transportation capabilities and lawyer density patterns reveal that there is more than sufficient legal manpower to staff the courts. (See Martindale-Hubbell Law Directory, showing lawyer distribution patterns in Kentucky.) Belying this justification is the theoretical provision of counsel, as required by *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972), to all criminal defendants in even the most remote courtrooms in Ken-

utcky.[15] Moreover, to further its interests, the state has available to it alternative, "less drastic means", which recognize the rural-urban disparity in legal manpower but still advance the state's objectives. For example, the state might follow the federal lead in requiring bar membership for inferior court judges—magistrates, in the federal system—unless there is a demonstrable showing that no attorney is available in the particular locale (28 U.S.C. Section 631(b)) or in permitting an accused to elect to stand trial before an attorney judge in a higher court (18 U.S.C. section 3401 (b)); third, the notion that "the larger cities have greater financial resources with which to provide better qualified personnel and better facilities for the courts" is an obviously insubstantial consideration under the strict scrutiny test. See *Shapiro* v. *Thompson*, supra. If financial resources available in a particular area is to be a justifiable standard of approved fairness in a criminal trial, then we place a price tag on our fundamental freedoms—an intolerable concept.

Thus, it is clear that the classification cannot be sustained under the "compelling state interest" test, nor, as we will see, can it be sustained under the less restrictive "rational basis" test.

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15. Implementation of Argersinger in lay courts is often more theoretical than real, as any outland lawyer will attest.

(2) The Kentucky Police Court Scheme Establishes Classifications on the Basis of Criteria Wholly Unrelated to the Objectives of the Statutes and Therefore Violates the Equal Protection Clause of the Fourteenth Amendment.

a. The Classifications and Their Objectives

Under the less restrictive scrutiny standard articulated by this Court on numerous occasions, the Kentucky Police Court scheme is untenable. In *Reed* v. *Reed*, 404 U.S. 71 (1971), where a unanimous Court invalidated an Idaho probate provision giving men mandatory preference over women when persons of the same priority class applied for appointment to administer a decedent's estate, Chief Justice Burger articulated the now applicable standard for such differential treatment:

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to the states the power to treat different classes of persons in different ways. The Equal Protection clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'. *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)". 404 U.S. at 75-76 (citations omitted). See *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

Under this standard, the constitutionality of the Kentucky scheme depends on whether the population criteria which is the basis of the challenged classifications substantially advance the legislative purposes of the statutes. Appellant submits that they do not in any rationally justifiable way. The main objective of the Kentucky legislature, as inferred from the three reasons divined by the Kentucky Court of Appeals in *Ditty*, supra, appears to be a justifiable *relaxation of standards of juicial competence* in rural areas where, because of population, the number of lawyers are presumed to be scarce. Yet, as we have seen, there is no necessarily consistent or rational correlation between the class city and the number of lawyers practicing therein. Moreover, even the small number of lawyers in many lower class cities are sufficient to handle the small amount of judicial business transacted in those cities.

Again the differential treatment is attributed by the Court of Appeals to docket considerations, the court inferring from the legislation that, because of the greater case loads in urban areas lawyer judges are required to promote efficiency and expedition of the case load. This seems a slight basis upon which to excuse a disriminatory practice. If appellant's court experience is any indication, Judge Russell's disposition of criminal charges is both efficient and expeditious.

Finally, the court inferred from the legislation that another objective of the Kentucky Legislature was to require lawyer judges in urban counties, where money is available to pay them, but to require no such judges in those smaller towns where the cities presumably could not afford a lawyer judge. To group all lower-population cities in this

fiscal category is, on its face, over-inclusive and conjectural.

(3) Recent Rulings

In recent years. this Court has had several occasions to rule upon state action which discriminates against one class of its citizens in a way which deprives that class of some right or immunity guaranteed to them under the Fourteenth Amendment to the United States Constitution, *e.g.*, *Williams* v. *Illinois*, 399 U.S. 235 (1970); *Tate* v. *Short*, 401 U.S 395 (1971); *Mayer* v. *Chicago*, 404 US. 189 (1971); *Eisenstadt* v *Baird*, 405 U.S. 438 (1972); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Baxstrom* v. *Herold*, 383 U.S. 107 (1966).

Applying these and other decisions to this case, it must be said that:

, (1) Kentucky's statutory scheme discriminates against persons standing trial in small towns by providing to them judges of inferior capacity and competency while providing persons similarly situated in urban areas with judges of superior competency.

(2) This discrimination is burdensome to the fundamental rights of such persons to a fair trial.

(3) There is no compelling state interest in providing such citizens with anything other than a competent judge and a fair hearing.

(4)„The objectives, purposes, and reasons for the discrimination conjectured by the Court of Appeals (fiscal consideration, availability of lawyers, and docket de-

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mands) are no justification for the differential treatment accorded the differing classes. The differential treatment by class is patently overinclusive and the reasons advanced for such differential treatment will not withstand the court's requirement of reasonableness.

In consideration of the foregoing this Court should note probable jurisdiction.

B. Trial by a Lay Judge Devoid of Knowledge or Understanding of the Substantive and Procedural Law Essential to a Fair Trial Violates the Due Process Clause of the Fourteenth Amendment.

(1) Due Process of Law Comprehends the Right in a Criminal Trial to a Judge With Knowledge and Understanding of the Substantive and Procedural Law Essential to a Fair Trial.

Law, by nature, is technical and complex. Because of the ultimate stakes invloved, the criminal law, in particular, has evolved into a panoply of rules and procedures, often containing subtle distinctions, which must be applied to the unique facts of a particular case with diligence and sensitivity by the presiding judge. Even in so-called minor or petty offenses this Court has recognized that the "legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are [no] less complex than when a person can be sent off for six months or more". *Argersinger* v. *Hamlin*, 407 U.S. 25, 33 (1972).

Without schooling in the fundamentals of legal analysis and reasoning, an untrained and unversed judge in-

evitably decides each case on the basis of uninformed discretion, which "however benevolently motivated, is . . . a poor substitute for principal and procedure." *In re Gault*, 387 U.S. 1, 18 (1967) (condemning the lack of legal expertise on the part of lay juvenile judges). Exercising "common sense", the judge turns the rule of law, integral to the preservation of society, into rule by fiat and whimsy. Dean Roscoe Pound has trenchantly observed how typical lay judges irresistably make a mockery of justice:

> "With no training in the law, no training in the process of judicial thought, and no mental habit of mind acquired by constant experience in legal reasoning, it would indeed be strange if a [lay judge] did not treat each case as a unique proposition. He has no category or class into which he may place it, no analogies from which to draw to solve the new problem before him. He has no legal rules, principles or standards by which to judge the merits of the controversy to be decided. Wholly unlike the judge who is trained in the law, he has no precedents to guide him. In deciding the cause before him the lay judge is necessarily limited by his own personal experience acquired in the short span of a single lifetime. He cannot call on the legal experience of the ages to assist him but is helpless to any more than apply his own personal notions of right and wrong to the case at hand. The justice which such tribunal is capable of dispensing is but the outcropping of the experiences of a personality, often limited and warped by passion and prejudice, and at best, as variable as the personalities of the justices who comprise [the sys-

> tem] . . . Such justice is not justice at all. It is unequal, uncertain and capricious". R. Pound, Outlines of Lectures on Jurisprudence 75 (3d ed. 1963).

Stated most simply, the reality of the archiac system challenged in this case cannot comport with the demands of modern-day justice.

On many occasions, this Court has described the overwhelming difficulties any layman faces when confronted with the complexities of the law in the context of a criminal proceeding. In *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), for example, the Court stated the obvious truth: "That which is simple, orderly and necessary to the lawyer to the untrained layman may appear intricate, complex, mysterious." *Id. at* 462-63. Perhaps the most persuasive line of cases supporting the concept of a legally knowledgeable tribunal as a necessary component of a fair trial are those cases articulating and extending the right to counsel in criminal cases. Inherent in the holdings of *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Gideon* v. *Wainwright*, 372 U.S. 342 (1963); and *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) is the inexorable corrollary that the defendant's right to counsel and to a fair trial includes, both on *sixth* and *fourteenth* amendment grounds, the right to a judge who is mentally equipped to comprehend the arguments of counsel and to conduct a trial in a manner most conducive to the emergence of truth. These cases explicitly recognize the competence only a lawyer can bring to the defense of an accused and the fair application of the law, and emphasize, however implicitly, that counsel and the court must complement each other to insure the proper funtioning of our adversary system of

justice. See generally *D. Peck, The Complement of Court and Counsel* (1954).

The foregoing analysis suggests the importance of the due process issue presented in this case to the rational administration of criminal justice. Without repeating the due process formulas cited by the Kentucky Court of Appeals in *Ditty* v. *Hampton, supra,* appellant submits that the concept of a fair trial under the Fourteenth Amendment includes the right of a criminal defendant to be tried by a judge knowledgeable of the relevant law and able to comprehend counsel. Absent such a minimally competent judge, the entire foundation of our adversary system is impaired, for the procedural and substantive safeguards designed to assure a fair trial are ignored, or at best, ineptly applied. See Traynor, *Rising Standards of Courts and Judges,* 40 Calif. S.B.J. 677, 690 (1955) ("The finest tools may still botch a job in the hands of an inept carpenter"). If the concept of *ordered* liberty, *Palko* v. *Connecticut,* 302 U.S. 319, 325 (1938), is to have any meaning, it must include recognition by the expositors of the law of the basic guarantees underlying our system of justice. This recognition and accompanying expertise, "the keystone of the whole venture", *In re Gault,* 387 U.S. 1, 14 n. 14 (1967), is markedly absent in the inferior courts of Kentucky and, according to most commentators, in the lower courts of other states. With the implementation of *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972), extending the right to counsel in misdemeanor cases, nearly complete in most states, the time is ripe for this Court to insure that the *Argersinger* mandated lawyers will be

practicing in courts that are capable of affording a fair trial to all criminal defendants.

The facts in this case conclusively show that Judge Russell was utterly incapable of affording a fair trial to Lonnie North or, for that matter, to any criminal defendant. Without any legal training, Judge Russell was totally ill-equipped to comprehend the rules of evidence or the applicable rules of criminal procedure. Even if he desired to educate himself in particular cases, his sources of independent information were few. Even more revealing is Judge Russell's candid admission that he is virtually unfamiliar with the Bill of Rights and their interpretation by this Court in criminal cases and only nominally familiar with State criminal law. With this meager background, Judge Russell exercised in Lonnie North's case the kind of unfettered discretion antithetical to the concept of *ordered* liberty implicit in our notion of a fair trial. Without rules and principles as touchstones to decision, due process is simply nonexistent in Judge Russell's courtroom.

The appellant in the state court alleged and argued the unconstitutionality of KRS § 26.200, contending that that statute, fixing the qualifications of police court judges in cities of the fifth and sixth classes, is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States for the reason that it subjects him to trial in a criminal court before a judge who has not the competency, capacity, knowledge and understanding of his procedural and substantive rights, so as to accord to the appellant those rights secured to him by the Constitution and laws of Kentucky and by the Constitution of the United States of America. He also alleged and argued in the lower court that trial, conviction, and incarceration of him by Judge Russell in the Lynch Police Court, so constituted, deprived him of the due process of law as guaranteed to him under the United States Constitution. It is submitted that this Court ought to note jurisdiction on both of these issues by extending a full hearing on his appeal and/or grant of the discretionary writ of *certiorari*.

(2) A Criminal Trial Presided Over by a Lay Judge Who, Because of His Ignorance of the Law is Totally Dependent Upon the Prosecutor for Legal Advice, Involves Such Prejudice That it is Inherently Lacking in Due Process.

The transcript depicting the trial of Lonnie North by Judge Russell is a stark example of the prejudice encountered by a criminal defendant when tried by a lay judge. The North "trial", however, cannot be singled out as unusual. The probability of an unfair hearing pervades Judge Russell's courtroom and, consistent with the Constitution, he should not be permitted to sit in criminal cases because of the inherent probability that all criminal defendants facing trial in his court will be prejudiced in their ability to obtain a fair and impartial hearing.

In invalidating the televising of the courtroom proceedings in a criminal trial as repugnant to the fundamental right to a fair trial guaranteed by the fourteenth amendment, this Court in *Estes* v. *Texas*, 381 U.S. 534 situations where the probability of prejudice infecting a trial can be presumed: "It is true that in most cases involving claims of due process deprivations we re-

quire a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process". *Id. at* 542-43. See *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); See *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972); *Rideau* v. *Louisiana,* 373 U.S. 723 (1963); In *re Murchison,* 349 U.S. 133 (1955); *Tumey* v. *Ohio,* 273 U.S. 510 (1927). In many other instances, this Court has promulgated a prophylactic rule of unconstitutionality in an endeavor to prevent even the possibility of unfairness in criminal proceedings. See *North Carolina* v. *Pearce,* 395 U.S. 711 (1969); *Bruton* v. *United States,* 391 U.S. 123 (1968); *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *Jackson* v. *Denno,* 378 U.S. 368 (1964).

Another reason for this Court to disqualify Judge Russell, on Fourteenth Amendment's grounds, from presiding in criminal cases is the direct relationship between Judge Russell's lack of legal knowledge and his necessary reliance on the city attorney—in effect, the prosecutor—for all legal advice. In *Tumey* v. *Ohio,* 273 U.S. 510 (1926), the Court set a rigid standard in cases where a trial judge may even possibly be tempted to overlook the competing claims of the prosecution and the defense. *"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denied the latter due process of law". Id. at* 532 (emphasis added). See *Ward* v. *Village of Monroeville,* 409 U.S. 57, 60 (1972). Given the probabilities of prejudice and unfairness inherent in trial by a lay judge it is important for this Court to decide whether a rule of unconstitutionality should be applied to invalidate the practice of trial by judges incapable of holding "the balance nice, clear and true between the state and the accused".

(3) The Standards Set Forth in Shadwick v. City of Tampa, 407 U.S. 345 (1972), Support Appellants Right to be Tried Before a Competent Judge.

Shadwick v. *City of Tampa,* 407 U.S. 345 (1972), holds that a state may constitutionally empower a lay individual to perform judicial functions. That case, of course, upheld a Florida law by which court clerks, who were not attorneys, were empowered to issue warrants of arrest and to make determinations of probable cause for the issuance of such warrants.

In that case, this Court laid down a rather exacting standard in connection with the issuance of warrants by lay persons upon the showing of probable cause. In that case, the Court stated, (407 U.S. 345 at 350):

> "Thus an issuing magistrate must meet two tests. He must be neutral and detached and he must be capable of determining whether probable cause exists for the requested arrest or search."

This Court went further and said:

> "If, on the other hand, detachment and capacity do co-join, the magistrate has satisfied the Fourth Amendment's purpose."

Thus, even in connection with so simple a legal judgment as probable cause, this Court has required that the official making the legal determination of probable cause have the capability of making such determination. The holding in the *Shadwick* case is of considerable comfort to appellant, North, because the Court in that case made it very clear that a person exercising judicial functions in criminal cases must have the capacity to make considered legal judgments.

Of course, the appellant in the *Shadwick* case failed to show by any evidence that the clerk which issued the warrant in question was not capable of making a legal judgment as to whether probable cause for issuing the warrant existed. In this case, the Transcript of Evidence (Appellant's Jurisdictional Statement, Appendix 5, page 16a) very clearly demonstrates that Judge Russell was empowered to perform judicial functions which he was totally incapable by training, knowldege and experience to perform.

CONCLUSION

Any decision as to whether this Court should note probable jurisdiction and direct plenary hearing of this case on the merits will, no doubt, involve the following considerations:

(a) Should an untrained judge's competency and capacity to preside in a criminal trial involving the possible loss of liberty be a subject of due process inquiry on a case-by-case basis?

(b) Should minimal due process qualifications relating to judicial capacity and competency be defined by this Court?

(c) How should differential treatment of accused misdemeanants in regard to qualifications of presiding judges be dealt with?

(d) Should a *per se* rule of unconsitutionality be considered, as in the *Gordon* case, supra?

In connection with the above considerations, it is submitted that the criminal processes in every State in the Union investing untrained judges with trial jurisdiction in criminal cases are involved in this appeal and that those processes require attention from this Court in the interest of the uniform administration of criminal justice among the 50 states.

We respectfully urge this Court to note probable juris-

diction on all issues advanced in this Statement and to order plenary consideration of this case.

Respectfully submitted,

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OF COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Jurisdictional Statement and Appendix were served upon Honorable Wix Unthank, Commonwealth Attorney, Harlan, Kentucky 40831, Attorney of Record for Appellees, C. B. Russell and Nathaniel "Trap" Helton, and upon Honorable Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky 40601, by mailing same, postage prepaid, on this 5th day of May, 1975.

Charles E. Goss

CHARLES E. GOSS

APPENDIX

APPENDIX 1

Rendered: March 21, 1975

COURT OF APPEALS OF KENTUCKY

74-723

LONNIE NORTH .....*Appellant*

V. APPEAL FROM HARLAN CIRCUIT COURT
HON. EDWARD G. HILL, JUDGE
CIVIL ACTION NO. 2093

C. B. RUSSELL; NATHANIEL
"TRAP" HELTON, Harlan
County Jailer .....*Appellees*

OPINION OF THE COURT BY JUSTICE PALMORE
AFFIRMING

This proceeding began with a petition for habeas corpus filed in the Harlan Circuit Court by the appellant, Lonnie North, against the appellees, C. B. Russell, police judge of the City of Lynch, and Nathaniel "Trap" Helton, jailer of Harlan County. North alleged that he was being detained in the county jail pursuant to a judgment of the police court finding him guilty of drunk driving[1] and fixing

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1. KRS 189.520

2. KRS 189.990(10)(a).

APPENDIX 1

his punishment at 30 days in jail and a fine of $150.[3] Entitlement to relief by way of habeas corpus was asserted on the theory that because the statute prescribing the qualification of police judges in fifth and sixth-class cities[3] do not require any legal training or knowledge, and because Judge Russell is a "lay" judge, unlearned in the law, the action or judgment by which North was committed to jail violated his rights of due process and equal protection of the laws under the 14th Amendment and was void.

Though sympathetic to North's constitutional argument, the trial court relied upon *Ditty* v. *Hampton,* Ky., 490 SW 2d 772 (1973), in denying relief, and the judgment was affirmed by this court in *North* v. *Russell,* Ky., 516 SW 2d 103 (1974). North then appealed to the United States Supreme Court.

In response to a jurisdictional statement and brief filed in the Supreme Court by North the Attorney-General of Kentucky filed a motion to dismiss or affirm in which the following footnote appeared:

> "The uncontested facts of this case establish that appellant requested but was denied a jury trial. Under Kentucky law he was entitled to the jury trial he requested. KRS 26.400(4). Further it appears that Judge Russell mistakenly imposed a sentence of imprisonment upon appellant for a first offense of driving while intoxicated, whereas imprisonment is not an authorized punishment for first offenders but can be imposed only upon commission of subsequent offense. KRS 189.990(10)(a). Accordingly appellee must concede that appellant should have been granted the writ of habeas corpus for which he filed. However, appellant has never requested that a Kentucky Court grant him relief to which he is entitled under Kentucky law, but has on the contrary consistently demanded that he be granted a writ of habeas corpus on the ground that the Kentucky police court system is in violation of the U. S. Constitution. It is appellee's position that even should this Court note probable jurisdiction over the constitutional issues which appellant raises, it should nonetheless refrain from deciding the federal questions involved in this case and remand the case to the Kentucky Court of Appeals for that Court's consideration of whether or not appellant should be granted a writ of habeas corpus solely upon the basis of violations of Kentucky law which occurred in the course of appellant's trial before the Lynch Police Court."[4]

On the basis of this footnote the Supreme Court has vacated our judgment in *North* v. *Russell,* supra, and re-

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3. KRS 26.200.

APPENDIX 1

4. Since there is no official record of the proceedings in the Lynch Police Court, the Attorney General's understanding that the alleged offense was the appellant's first appears to be an assumption. It is neither alleged nor conceded to be a fact.

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manded the case "for further consideration in light of the position presently asserted by the Commonwealth," to the utter consternation of the appellant, who of course is interested only in the constitutional issue and vigorously contests the suggestion that he be graned relief on another and less spectacular ground. The result is that we find ourselves performing an unwilling and not altogether felicitous role in a judicial fan dance.

Appellate courts have more to do than deal with errors of which appealing parties make no complaint. It is elementary that errors of which an aggrieved party is perfectly well aware but which he chooses not to bring to the attention of the court are waived. The blunt fact is that this appellant wants only to test the constitutional status of lay judges in criminal cases, whereas the Attorney-General has no appetite for that particular field of battle.

We fully appreciate the absurdity of having a lawsuit—any lawsuit—presided over in this day and age by a person without legal training or experience. Nevertheless, it was our conclusion in *Ditty* v. *Hampton*, Ky., 490 SW 2d 772 (1973), that the federal constitution does not deny the people the right to have it that way if they so desire. Moreover, when this habeas corpus proceeding began and when it was decided in this court there was still time in which the appellant could have secured a trial *de novo* in the Harlan Circuit Court by the simple expedient of an appeal from the judgment of the Lynch Police Court.

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KRS 23.032; RCr 12.02—12.06, incl. Cf. *Colten* v. *Kentucky*, 407 U.S. 104,112 (1972)

The constitutional issue was and is the only issue before us, and we have decided it adversely to the appellant. So again, the judgment is affirmed.

All concur.

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APPENDIX 2

HARLAN CIRCUIT COURT

LONNIE NORTH .....*Petitioner*

VS. PETITION FOR WRIT OF HABEAS CORPUS

C. B. RUSSELL, NATHANIEL
"TRAP" HELTON, Jailer of
Harlan County .....*Respondents*

(1) The Petitioner, Lonnie North, being first duly sworn, represents to the Court that he has been and is being detained by the Jailer of Harlan County, Kentucky, Nathaniel "Trap" Helton, in the Harlan County Jail under the order and judgment of the Respondent, C. B. Russell, Lynch City Court Judge, without lawful authority, the pretended cause of such imprisonment being as follows:

> "On or about Wednesday, July 10, 1974, the Petitioner was detained by the Chief of Police at Lynch, Kentucky, whose name is unknown to the Petitioner and held in the City of Lynch, Kentucky for the arrival of the Cumberland City Police; whereupon the Petitioner was taken from the City of Lynch by Chuck Hollitt to the City of Cumberland, Kentucky, a separate municipal entity, and cited by the said Cumberland City Police upon a charge of reckless driving; whereupon the Petitioner returned to his home at Lynch, Kentucky. Shortly

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thereafter, the Petitioner received a telephone call from the Lynch City Police directing him to come to the Lynch City Hall to remove the motorcycle upon which the Petitioner was riding at the time that he was detained by Lynch City Police; whereupon the Petitioner traveled to the Lynch City Hall in company with his brother, Ronald North, and his Father, Eli North, for the purpose of assuming possession of the motorcycle; whereupon, a Lynch City Policeman known only as "Potter", whose full and true name is unknown to the Petitioner, directed the Petitioner to Lynch City Hall and cited the Petitioner accusing him of the crime of driving while intoxicated; whereupon, the Petitioner was immediately admitted to bail and returned to his home at Lynch, Kentucky under directions from the said "Potter" to return to City Hall on Thursday, July 18, 1974, at the hour of 8:00 P.M.; whereupon, the Petitioner appeared at the City Hall at the appointed time and place before the Respondent, C. B. Russell who, in the presence of Eli North, Terry Creech, and Hal Woods, called for the Petitioner's plea to the charge of driving while intoxicated, with the Petitioner responding, "Not Guilty". Whereupon, in the presence of the aforesaid witnesses, the Respondent, C. B. Russell, stated, "I will give you a jury trial if it takes all damn night". Then he left the room and was gone about ten minutes. He came back and said, "I have talked to a lawyer and we don't need no jury, I am going to try you

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myself. I fine you $150.00, suspend your operator's license and give you 30 days in County Jail". Whereupon he said, "Where are the Police". Upon arrival of the police, the said Respondent, C. B. Russell, handed the said city police a slip of paper and said, "Take him to the Harlan County Jail". Whereupon, without the evidentiary hearing whatsoever, without benefit of legal advice or legal counsel, without any advice as to his legal rights, without right to confront the witnesses against him and to introduce evidence of his innocence the Petitioner was taken to the Harlan County Jail by said police officer to serve 30 days, as he was so advised, where he presently remains.

(2) All of the above procedures relating to the trial of the said Petitioner are in total disregard of the rights of the Petitioner as an accused in a criminal case, as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America, and deprive the Petitioner of his right to due process of law under the Fourteenth Amendment to the Constitution of the United States of America and renders the conviction of the Petitioner void *for the following reasons*:

(1) KRS 26.010, conferring criminal jurisdiction upon cities of all classes and KRS 26.200 fixing the qualifications of police judges in cities of the 5th and 6th classes, deny Petitioner equal protection of the laws (a right accorded to him under the Fourteenth Amendment to the Constitution of the United States of Amer-

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ica), he being a person accused of crimes against the laws of Kentucky in the police court of the City of Lynch, Kentucky, a city of the 5th class presided over by a Judge, not cognizant of the constitutional, statutory and common-law substantive and procedural rights accorded to him as a citizen of Kentucky and of the United States of America, whereas a person similarly accused in a city of the 1st and 2nd class is, by virtue of the same chapter provided a judge who is so trained in the law and who is cognizant of such rights.

(2) KRS 26.200, fixing the qualifications of the police judges in cities of the 5th class denies to Petitioner due process of law (a rght accorded to him under the Fourteenth Amendment to the Constitution of the United States of America), he being a person accused of crimes against the laws of Kentucky in the police court of the City of Lynch, Kentucky, a city of the 5th class presided over by a Judge, to-wit: C. B. Russell, the said C. B. Russell not being a person cognizant of the constitutional, statutory and common-law substantive and procedural rights accorded to the said Petitioner as a citizen of Kentucky and of the United States of America.

(3) The Respondent, C. B. Russell, is a "lay judge", who has absolutely no formal training in law, and who has not acquired either by formal education, training or experience, a sufficient body of knowledge relating to the constitutional, statutory and common-law substantive and procedural rights accorded to the Petitioner as an accused in a criminal case, for which reason the Re-

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spondent does not have the competency and the capacity to accord to the Petitioner his constitutional, statutory and common-law substantive and procedural rights which are accorded to him as a citizen of Kentucky and as a citizen of the United States of America. As a direct result of such incompetency and such incapacity, the Petitioner now resides in the County Jail in the City of Harlan, Kentucky, under a jail sentence of 30 days incarceration, upon a charge of driving while intoxicated, even though he has not been accorded the following constitutional rights accorded to him under the Fourteenth Amendment to the Constitution of the United States of America:

(1) His right to equal protection of the laws in that he has not been accorded a tribunal presided over by a judge having the competency and the capacity to accord him all of his constitutional, statutory and common-law substantive and procedural rights.

(2) He is incarcerated without benefit of any evidentiary hearing having been held although he entered a plea of "Not guilty".

(3) He is incarcerated without having had the benefit of a Jury trial.

(4) He is incarcerated without having been afforded the right to confront the witnesses against him.

(5) He is incarcerated without the benefit of having been permitted to produce any evidence in his own behalf.

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(6) He is incarcerated without having been advised of his right to counsel, to trial by jury, to confrontation of witnesses against him, and to an evidentiary hearing. The trial of Petitioner in such tribunal by a judge so incapacitated deprives him of his right to due process of law as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States of America.

WHEREFORE, Petitioner demands that a Writ of Habeas Corpus issue, directing the Jailer of Harlan County to present him before the Honorable Edward G. Hill, Judge, Harlan Circuit Court, at a time and place to be fixed by the Court, and directing the appearance of the said C. B. Russell and the appearance of the said Nathaniel "Trap" Helton to show cause, if any, as required by law, why the Petitioner should not be released from said detention and from custody; that, pending the hearing date and pending an evidentiary hearing on the questions presented in this petition, the Petitioner be admitted to bail; that the Respondent, C. B. Russell, be required to deliver his driver's license to him.

This 19th day of July, 1974.

LONNIE NORTH

By EUGENE GOSS

Attorney for Plaintiff
Central Street
Harlan, Kentucky

APPENDIX 3

HARLAN CIRCUIT COURT

CIVIL ACTION No. 2093

LONNIE NORTH .....*Petitioner*

VS: OPINION AND ORDER

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, Jailer of Harlan County .....*Respondent*

The Petition for Writ of Habeas Corpus in this case came on for hearing on July 23, 1974 at the hour of 9:00 A.M. in the Harlan Circuit Court Room, Harlan, Kentucky, Edward G. Hill, presiding, and the Petitioner, Lonnie North, represented by his counsel, Eugene Goss, having appeared and announced ready and the Respondents, C. B. Russell and Nathaniel "Trap" Helton, having appeared and having announced ready, a evidentiary hearing was held by the Court, in which the Petitioner, Lonnie North, presented testimonial evidence from witnesses from which evidence it patently appears that the allegations for the Petition for Writ of Habeas Corpus are substantially true.

It is the sole contention of the Petitioner in his Writ that he is restrained of his liberty without lawful authority, for the reason that he was "tried" by a lay judge who was constitutionally disqualified from presiding in his case for the reason that the "trial judge" does not have the competency and the capacity to accord to the

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Petitioner his constitutional, statutory and common-law substantive and procedural rights which are accorded to him as a citizen of Kentucky and as a citizen of the United States. The Petitioner assigns in his Petition as grounds for his release:

(1) That KRS 26.010 and KRS 26.200, conferring criminal jurisdiction upon cities of all classes and fixing the qualifications of police judges in cities of the 5th and 6th classes, deny to the Petitioner equal protection of the laws for the reason that such statutes permit a citizen in a 5th class city to be tried by a judge ignorant of the law while the same citizen residing in a 1st or 2nd class city is provided with a judge which is minimally qualified as a practicing lawyer:

(2) Also KRS 26.200 fixing the qualifications of police judges in cities of the 5th class deny to the Petitioner his right to due process of law under the Fourteenth Amendment for the reason that Respondent, C. B. Russell, holding office under such statute, is unable by training, knowledge and experience to accord to him his constitutional statutory, and common-law substantive and procedural rights accorded to him as a citizen of Kentucky and of the United States of America, and;

(3) That the trial judge, C. B. Russell, is a "lay judge" who has no training in the law and who has not acquired either by formal education, training or experience sufficient body of knowledge relating to Petitioner's rights as to enable him to accord to Petitioner

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all of his constitutional, statutory and common-law substantive and procedural rights.

It must be said that he Petitioner has grounded his Petition for Writ of Habeas Corpus solely upon the grounds of the judge's disqualifications by reason of the judge's alleged incompetency and incapacity to accord to him a fair trial. The adequacy of the proceedings themselves to accord to the Petitioner his constitutional rights are not raised in the Petition, and the Petitioner grounds his right to release solely upon what he terms to be the constitutional incapacity or constitutional disqualifications of the trial judge for the reason above stated.

The issues presented in this Writ are similar to those issues presented in the case of *Ditty* v. *Hampton,* 490 SW2d 772 (Ky. 2973), wherein the Court of Appeals reversed a holding by this Court that an accused in a criminal case may not be tried by a tribunal presided over by a judge who is incapable by reason of training, experience and knowledge to accord the Petitioner a fair hearing in which he is accorded all of his rights as a citizen of Kentucky and as a citizen of the United States of America. The occurrences in this case again indicate the basic falacies in a judicial system which allows persons of insufficient training, knowledge and experience to preside at criminal trials which, inherently, require a great deal of training, knowledge, and experience, in order that each citizen be accorded the rights guaranteed to him under the law.

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Obviously, the Petitioner has intentionally grounded his request for release upon the limited constitutional grounds hereinabove set forth. This Court does not feel that it should or can go beyond the Petitioner's pleadings and the evidence and accord relief to the Petitioner in a form different from that relief which he is seeking. It would be easy enough in this case for the Court to hold that, under the evidence, the Petitioner has been denied even his most basic consitutional rights, and order him released from custody. However, he might find himself again facing the same tribunal presided over by the same judge, which would be a wholly inadequate relief of a kind completely different from that which he seeks in this proceeding.

The Court, under the rule in the *Ditty* case, *supra,* is constrained to dismiss the Petition for Writ of Habeas Corpus and to deny the relief requested by the Petitioner, but does so upon the narrow ground that the Fourteenth Amendment to the Constitution of the United States of America does not prohibit the trial of the Petitioner by the Respondent, C. B. Russell, as the duly constituted and presiding judge of the City of Lynch, Kentucky, a city of the 5th class, irrespective of the said trial judge's knowledge or lack of knowledge of the Petitioner's rights as a citizen of Kentucky and as a citizen of the United States of America, and irrespective of the ability or inability of the said judge to accord to the Petitioner those rights which he, as a citizen of Kentucky and as a citizen of the United States of America, holds under the laws

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of the Commonwealth of Kentucky and under the Constitution of the United States of America. In the making of such ruling, the Court reluctantly dissolves the Writ of Habeas Corpus heretofore issued, and orders the Petitioner remanded to the custody of the Harlan County Jailer.

Provided, however, should the Petitioner file a Notice of Appeal, within the time allowed by the pertinent rules, indicating his intention to appeal this case to the Court of Appeals of Kentucky, he shall remain free under the bond previously executed by him.

This 23rd day of July, 1974.

/s/ EDWARD C. HILL, JUDGE

EDWARD C. HILL, JUDGE
HARLAN CIRCUIT COURT

APPENDIX 4

COURT OF APPEALS OF KENTUCKY

FILE No. 74-723

LONNIE NORTH .....*Appellant*

VS: NOTICE OF APPEAL

C. B. PUSSELL; NATHANIEL "TRAP" HELTON, Harlan County Jailer .....*Appellees*

Notice is given to all parties listed above that Lonnie North, the appellant, appeals to the Supreme Court of the United States from the decision of the Court of Appeals of Kentucky in the above-styled case, rendered March 21, 1975.

This appeal is filed as a matter of right pursuant to 28 U.S.C. Section 1257 (2) (1970).

ATTORNEYS FOR APPELLANT, LONNIE NORTH

/s/CHARLES E. GOSS

EUGENE GOSS
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Harlan, Kentucky

DEAN RIVKIN
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CERTIFICATE

I hereby certify that I have this day mailed a true and correct copy of the foregoing Notice of Appeal to Honorable Wix Unthank, Commonwealth Attorney, Harlan, Kentucky 40831 and Honorable Ed W. Hancock, Attorney General, Capitol Building, Frankfort, Kentucky 40601, Attorneys for Appellees.

This 26th day of March, 1975.

/s/ Charles E. Goss

APPENDIX 5

THE PETITIONER CALLED AS A WITNESS,

C. B. RUSSELL,

WHO, HAVING BEEN DULY SWORN,
TESTIFIED AS FOLLOWS:

Direct Examination by Mr. Eugene Goss:

1 State your name.
A C. B. Russell, Jr.

2 Were you on the 18th day of July, 1974, the appointed City Judge for the City of Lynch, Kentucky?
A I was.

3 Is that a city of fifth class located at Lynch, Harlan County, Kentucky?
A Yes, sir.

4 When were you appointed as City Judge?
A January 7th.

5 1974?
A. Yes, sir. That's when I took office.

6 How much formal education do you have?
A I have a high school.

7 What kind of work have you done during your life time?
A The last twenty-three years I've been an assistant mine foreman with U.S. Steel.

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8 You worked as an underground coal miner?

A Yes, sir.

9 Have you ever attended any college or university?

A No, sir.

10 Do you hold any degree from any college or university?

A No, sir.

11 Have you ever attended any law school?

A No, sir.

12 Do you hold any degree from any law school?

A No, sir.

13 Prior to your appointment as City Judge of the City of Lynch, Kentucky, had you had any legal training whatsoever in the field of law?

A No, sir.

14 Prior to your appointment as City Judge of the City of Lynch, Kentucky, had you any previous judicial experience?

A No, sir.

15 Prior to your appointment as City Judge of the City of Lynch, Kentucky, had you had any previous legal experience of any kind?

A No, sir.

16 Have you had any legal training of any kind since your appointment?

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A Well, the only thing I can say, if I have any doubt, I just consult with the city lawyer, Mr. Bill Forester.

17 And when you consult with the city lawyer for advice, you mean you consult the city lawyer for advice in criminal cases, such as this case?

A Yes, sir.

18 And when you receive advice from the city attorney, do you follow that advice?

A Yes, sir.

19 Are you—would you say, you very much depended upon the city attorney for giving you guidance and final advice as to what procedures you should follow and as to what actions you should take in a criminal case?

A Would you mind re-stating that?

20 Read it back.

Reporter reads back question. "Would you say, you very much depend upon the city attorney for giving you guidance and final advice on what procedures you should follow and as to what actions you should take in a criminal case?"

A If I have any doubt in any case, I contact the lawyer.

21 You contact the city prosecutor?

A Yes, sir, for legal advice.

22 You depend on his decisions and the advice he

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gives you as to what actions you should take both from the procedural standpoint and as to what disposition you should make of a particular question? Is that correct?

A Yes, sir.

23 Since your appointment as City Judge, have you had any legal training whatsoever?

A No, sir. As far as schooling, no.

24 Have you ever taken any course at all in legal jurisdiction?

A No, sir.

25 Have you ever taken a course of any kind or had any legal training of any nature, relating to law?

A No, sir.

26 Have you ever had any course or any training whatsoever relating to the judiciary?

A No, sir.

27 Have you ever had any course or had any training with respect to the rules of evidence in a criminal or civil case?

A No, sir.

28 Have you ever had any course or any training whatsoever relating to the provisions of the Constitution of the United States of America?

A No, sir.

29 Are you familiar with the 14th Amendment to

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the Constitution of the United States and as to what it provides?

A Yes, sir.

30 What does that provide?

A Right off hand, I don't—something about judicial. I think one of them is judicial procedure or something another. I'm not for sure.

31 Do you think the 14th Amendment to the Constitution of the United States deals with judicial procedure?

A Right off hand, Mr. Goss, I couldn't tell you.

32 Are you familiar with the term "due process of law" or "equal protection of the law"?

A Yes, sir.

33 In legal meaning?

A No, that's beyond me.

34 Are you familiar with the rights according to a defendant as accused in a criminal case under the 14th Amendment of the Constitution of the United States of America?

A Would you re-state that question?

35 Are you familiar with the rights according to a defendant as accused in a criminal case under the 14th Amendment to the Constitution of the United States of America?

MR. WIX UNTHANK: May it please the Court. At this time, we'd like to object. The witness has

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stated he has not had any legal training, and I think these questions here are just repetitious, bearing upon the question of legal training.

THE COURT: I think the fact has been established that he's not a lawyer, he doesn't know any law, he hasn't studied any law.

MR. EUGENE GOSS: Judge, I think we're entitled to prove the depth of the knowledge — of his knowledge with respect to specific knowledge of various legal formulas, legal procedures, such as law. He may have some inherent knowledge that we know nothing about. I'm not going to unduly labor this thing, but I think it's important to our case that we probe with in some detail, the man's knowledge of substance and procedure of law, and I would beg the Court's indulgence that it won't take a great deal of time, but it's extremely important in our case.

THE COURT: Well, go ahead.

36 Are you familiar with the rights according to a defendant as accused in a criminal case under the 14th Amendment of the Constitution of the United States of America?

A Mr. Goss, as I previous said, I don't know, exactly understand this 14th Amendment. I know part of it.

37 Are you familiar with the statutes of the Commonwealth of Kentucky relating to the empaneling of

APPENDIX 5

a petit jury, the qualifications of a petit jury and the selection of a petit jury in a particular criminal case?

A Well, I think I know some of the qualifications but as far as all of them, I don't.

38 Are you familiar with the order of trial in a criminal case?

A No, sir.

39 Are you familiar with the requirements of law of the Commonwealth of Kentucky with respect to the arraignment of a defendent accused of a crime?

A Yes, sir.

40 What are those procedures?

A You mean, are you talking about when someone is arrested?

41 Yes, and arraigned?

A Placed under bond and then have a hearing. Is that what you're referring to?

42 Yes. What are the procedures for arraignment of a defendant?

A Well, to me, that's the procedure.

43 That's all the procedure that you're familiar with?

A Well, after you give them a hearing, trial by jury, if he pleads guilty. I mean not guilty.

44 Are you familiar in a general way with the rules of criminal procedure of the Commonwealth of Kentucky?

A No, sir.

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45 Are you familiar in a general way with the provisions of Kentucky Revised Statutes as they relate to criminal prosecution?

A Would you re-phrase that statement?

46 Are you familiar in a general way with the provisions of the Kentucky Revised Statutes as they relate to criminal prosecution?

A Well, the only procedure I know, I can follow through the books we have up there now. Whether that answers you question or not, I don't know.

47 Do you have a copy of the Kentucky Revised Statutes in your office?

A Yes, sir.

48 Are you familiar with the Court system of the Commonwealth of Kentucky as established by the Constitution of Kentucky?

A Not altogether.

49 Are you familiar with a set of books known as the Kentucky Digest published by the West Publishing Company?

A The Kentucky Digest?

50 Do you know what that set of books is and what it's for?

A No, not off hand, I couldn't.

51 Are you familiar with a set of books known as the Kentucky Decisions published by the West Publishing Company?

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A I couldn't tell you, Mr. Goss, who published them or anything else. All I know is how to go through the index and look up what I want.

52 What is your understanding with respect to the usefulness of the case decisions published by the Court of Appeals of Kentucky?

MR. WIX UNTHANK: Your Honor, I'd like to object and renew my objection.

MR. EUGENE GOSS: Judge, I've got about four or five more questions left.

THE COURT: Can't you stipulate all this?

MR. WIX UNTHANK: Yes, sir.

THE COURT: All right, fix you up a stipulation.

MR. EUGENE GOSS: Your Honor, I think I could finish my questions faster than we could stipulate it.

MR. WIX UNTHANK: Well, I'd like to renew my objection.

53 Do you know the usefulness of those, the decisions of the Court of Appeals of Kentucky?

A Do I what?

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54 Do you know why the decisions of the Court of Appeals are useful in the administration of law?

A I can say misrepresentation of justice.

55 Are you familiar with the Supreme Court reports of the United States Supreme Court?

A I'm familiar with some of them, but I don't agree with all of them.

56 What is your understanding with respect to the effect that a Judge should give between conflicting rulings made by the Court of Appeals of Kentucky and the Supreme Court of the United States?

A I didn't hear that, Mr. Goss.

57 What is your understanding with respect to the effect that a Judge should give between conflicting rulings made by the Kentucky Court of Appeals and the Supreme Court of the Uinted States of America? Do you understand the question?

A No, I really don't. I don't think I know, if it would go to the Supreme Court from the Kentucky Court of Appeals. Is that what you're referring to?

58 Yes.

A Well, I just don't—as I say, there's a lot of cases the Supreme Court rules on I don't agree.

59 Are you a licensed lawyer?

A No, sir.

60 Judge, is it fair to say that you have only a very

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vague knowledge of the criminal law of the Commonwealth of Kentucky and United States of America with respect to the Constitutional and statutory rights that a defendent has and with respect to the enforcement of those rights; and with respect to criminal procedures of criminal law as it relates to criminal trials. Is that a fair statement?

A I'd say—no. I'd say I've got very little as far as back ground, but I've got a whole lot of common sense, Mr. Goss.

61 Now, did you bring with you the order book?

A Yes, sir.

62 From the city of Lynch relating to a trial of the defendant—the petitioner, Lonnie North?

A I brought the criminal docket with me which I docketed it in the book and I also have the warrant and the breathelizer test.

63 Do you have here with you a copy of the warrant which you served on this man?

A Yes, sir.

64 And this warrant was signed by you on the 12th day of July, 1974?

A Yes, sir.

65 And in that warrant you accused him of "driving while intoxicated." Is that correct?

A Yes.

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66 And you admitted the petitioner to bail in the sum of $175.00?

A Yes, sir.

67 Was that a cash bond?

A No, sir. Mr. North there, his name is on that. It's Eli North.

MR. EUGENE GOSS: Judge, we'd like to have a copy of this complaint filed with the stenographer and mark it "Judge Russell, Exhibit 1."

THE COURT: All right, have a copy made.

68 Now, you set trial on this man's case on what day?

A 18th.

69 18th of July?

A Yes, sir.

70 And on the 18th of July, did he appear in your Court?

A Yes, sir.

71 At what time?

A He was about forty minutes late, thirty five or forty minutes late.

72 What time did your Court take up?

A 7:00.

73 You mean they were late getting there?

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A Mr. North here, Lonnie North was late getting there, Mr. Goss.

74 Did you, in connection with the trial of his case, give him a jury trial?

A No, sir.

75 I believe his plea was not guilty, wasn't it?

A Yes, sir.

76 And he voiced that plea in your presence and in open Court?

A Yes, sir.

77 And you proceeded then to try him yourself?

A Yes, sir.

78 Was there an evidential hearing of any kind?

A You want me to proceed to tell you how it was I started with?

79 No, I just want to know if you held, before passing judgment on him, did you hold any kind of evidential hearing?

A Yes, sir.

80 What kind of an evidential hearing did you hold?

A Well, I sworn the arresting officer in and let him tell his story without any questions from me, let him tell his part, you know, his part in it, in the arrest. When I got through, I asked Mr. North if he had anyting and he said, "Yes." I asked him if he wanted—any questions he wanted to ask Mr. Potter and he said, "Yes." So he

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proceeded to ask him questions and when he got through, I asked him if he was through, and he said, "Yes."

81 And that's when you proceeded to find him guilty?

A Yes, sir.

82 Did you—what judgment did you make in the case?

A What sentence did I put on him?

83 Right.

A $150.00 and thirty days in jail and revoked his driver's licenses.

84 Now, do you have a judgment you prepared and entered into your order book, any kind of a judgment in which he is—in which that becomes the judgment of your Court?

A Yes, sir, in this docket book.

85 All right, would you find that in the docket there for me.

A Page 139, Item 411, I mean 410.

86 Would you read that, every word of that judgment to the Court?

A "On a DWI, license revoked, sentence to thirty days in jail, fine $139.50, costs $10.50, total of $150.00. 18th day of July, 1974."

87 And that's all you've got?

A And this is my signature.

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88 That's all you have on your book?

A Yes, sir.

MR. EUGENE GOSS: Judge, we'd like to enter a copy of that in to the record.

THE COURT: I don't know how you're going to make it. I think she's got the substance of it.

MR. EUGENE GOSS: All right. If the judgment as entered into the record is sufficient, do you have any objection to that, Mr. Unthank?

MR. WIX UNTHANK. No objection.

CROSS EXAMINATION BY MR. WIX UNTHANK:

1 Mr. Russell, how long have you lived at Lynch?

A Well, I was born in Lynch and I moved in 1947, 46 years old in 1947, and I moved and came back to Lynch, three years prior—

2 Well, is it a fair statement to say you've been there approximately forty years or something like that?

A Forty three years.

3 Now, what class city is Lynch?

A Fifth class.

MR. WIX UNTHANK: Mr. Goss, may it be stipulated in the record that Lynch is a fifth class municipal corporation under the laws of the State of Kentucky?

MR. EUGENE GOSS: Yes, sir.

MR. WIX UNTHANK: And that as such the statutes provide for the office of police judge for the city of Lynch?

MR. EUGENE GOSS: That's in my pleading

MR. WIX UNTHANK: Now, is it also agreed and stipulated that driving under the influence of intoxicating beverages is a statuatory crime in the State of Kentucky?

MR. EUGENE GOSS: Right.

MR. WIX UNTHANK: And as such, the police court of the fifth class city would have jurisdiction of this charge?

MR. EUGENE GOSS: Jurisdiction is conferred upon the police court, by the statutes.

MR. WIX UNTHANK: Now, is there any question concerning the legality of his arrest upon this charge by the officer?

MR. EUGENE GOSS: No.

MR. WIX UNTHANK: Then it is stipulated that he was legally arrested and charged with this offense?

MR. EUGENE GOSS: That isn't brought into issue in our petition.

MR. WIX UNTHANK: No, but can it be stipulated?

MR. EUGENE GOSS: Yes.

4 Now, Mr. Russell, going back to the time that

the officer came up there with the defendant, did the defendant demand a jury trial?

A The night of the hearing, is that what you're talking about?

5 Yes, sir. The night that you tried the case, did he demand a jury trial?

A He said, "not guilty." Yes, he wanted a trial by jury.

6 He said he was not guilty?

A Yes.

7 And he asked for a trial by jury?

A By the jury, yes.

8 Now, I believe you stated that you depended on the county attorney to tell you what the law was—I mean your city attorney to tell you what the law was?

A Yes, sir.

9 The city attorney of Lynch is William R. Forester?

A Yes, sir.

10 He is a member of the Harlan County Bar Association, is he not?

A Yes, sir.

11 And he's been practicing law in Harlan County quite a bit?

THE COURT: Can you stipulate that Mr. Forester is competent?

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MR. EUGENE GOSS: Yes, sir.

12 Now, Mr. Forester tells you what the law is but he does not tell you how to interpret it, does he?

A No, sir. He tells me, like you said, what the law is, you know. In other words, where I've got jurisdiction and like I stated awhile ago, if I have any doubt, I call our attorney. I want to be right.

13 As to how you're going to do something, you determine that yourself after he tells you what it is?

A Yes, sir.

REDIRECT EXAMINATION BY MR. EUGENE GOSS:

1 Did you empanel a jury there when he was tried?

A No, sir. We had no jury trial.

2 Prior to the commencement of the hearing which you said that you had there, did you advise the petitioner that he had a right to trial by jury, and that he had the right to introduce evidence in his own behalf and to confront the witnesses against him?

A I think so. That's usually the procedure.

3 Did you advise him that he had a right to have an attorney present to represent him in this matter?

A Yes.

4 You advised him that he had that right?

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A I'm pretty sure, Mr. Goss, I'm not going to say. That's usually the standard procedure.

5 Did you advise him that he had a right, in so many words or these direct words, did you advise him in words or substance that he had the right to introduce witnesses in his own behalf?

A He had no witnesses.

RECROSS EAMINATION BY MR. WIX UNTHANK:

1 Mr. Russell, if I may, prior to after taking his plea, did you make a telephone call to the city attorney?

A Yes, sir.

2 And I believe after you made the telephone call, you were under the impression or believed which you received the advice, that he did not have to have a jury trial. Is that correct?

A That's right.

REDIRECT EXAMINATION BY MR. EUGENE GOSS:

1 And you followed that advice?

A Yes, sir.

2 Did Mr. North have an attorney present there to represent him when you tried this case?

A No.

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(1) JUSTICES OF PEACE

4 Attorneys	)	99.4%
601 Non-attorneys	)	Non-attorneys

(2) POLICE COURT JUDGES

41 Attorneys	)	78.1%
146 Non-attorneys	)	Non-attorneys

(3) COUNTY JUDGES

14 Attorneys	)	88.4%
106 Non-attorneys	)	Non-attorneys

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KRS 189.520 (2) provides as follows:

"No person shall operate a motor vehicle anywhere in this state while under the influence of intoxicating beverages or any drug which may impair one's driving ability".

KRS 189.793 (10) (a) provides as follows:

"Any person who violates subsection (2) of KRS 189.520 shall be fined, for the first offense, not less than one hundred nor more than five hundred dollars, and for each subsequent offense he shall be fined not less than one hundred nor more than five hundred dollars and imprisoned for not more than six months".

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Kentucky Constitution § 156:

"Six classes; population determines classification; organization and assignment. — The cities and towns of this Commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. To the first class shall belong cities with a population of one hundred thousand or more; to the second class, cities with a population of twenty thousand or more, and less than one hundred thousand; to the third class, cities with a population of eight thousand or more, and less than twenty thousand; to the fourth class, cities and towns with a population of three thousand or more, and less than eight thousand; to the fifth class, cities and towns with a population of one thousand or more, and less than three thousand; to the sixth class, towns with a population of less than one thousand. The general assembly shall assign the cities and towns of the Commonwealth to the classes to which they respectively belong, and change assignments made as the population of said cities and towns may increase or decrease, and in the absence of other satisfactory information as to their population, shall be governed by the last preceding federal census in so doing; but no city or town

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shall be transferred from one class to another, except in pursuance of a law previously enacted and providing therefore. The genera! assembly, by a general law, shall provide how towns may be organized, and enact laws for the government of such towns until the same are assigned to one or the other of the classes above named; but such assignment shall be made at the first session of the general assembly after he organization of said town or city."